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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 772

MARTHA M. FRITZINGER, Parent and Natural Guardian of RICHARD R. RIEGNER, a Minor, in Her Own Right,
Petitioner

v.

RUSSELL MILLARD,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

RESPONDENT RUSSELL MILLARD'S BRIEF IN OPPOSITION

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RESPONDENT RUSSELL MILLARD'S BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit is reported at ——— F. 2d ——— and appears as an appendix to the Petition For Certiorari at page 16 thereof.

The opinion of the District Court for the Eastern District of Pennsylvania is reported at 270 F. Supp. 421 (E. D. Pa. 1967) and appears as an Appendix to the Petition for Certiorari at page 41 thereof.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

United States Constitution, Article III, Section 2:

> "The judicial Power shall extend to . . . Controversies . . . between Citizens of different States . . ."

28 United States Code, Section 1332:

> "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between (1) citizens of different States . . ."

28 United States Code, Section 1359:

> "A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court."

QUESTIONS PRESENTED

1. Whether this Court should hear and decide the constitutional question involved in the doctrine of "pendent jurisdiction" over a non-federal and non-diversity cause of action, which is the sole issue existing between Petitioner and Respondent, and the sole decision certified by the District Court as a Final Order under Rule 54(b), but is at the same time a question not decided by the Court of Appeals?

2. Whether in this case involving a Petitioner and a Respondent who are admittedly citizens of the same state, this Court can and should decide the question of "manufactured diversity" which does not exist between Petitioner and Respondent, but only between Respondent and the other plaintiff, who was not before the Court of Appeals and is not before this Court?

3. Whether, under the factual and legal situation outlined in the foregoing questions, this Court can and should review this Court of Appeals' decision departing from its own prior decisions so that the District Courts in the Third Circuit can now make, in individual cases, the factual determination necessary to decide whether or not any party has been improperly or collusively made or joined in order to invoke the federal courts' jurisdiction over a cause of action which could not otherwise be brought in the federal courts.

STATEMENT OF THE CASE

The only petitioner in this Court is Martha M. Fritzinger, mother of Richard R. Riegner.

The only respondent is Russell Millard.

In the district court, Mrs. Fritzinger described herself as the parent and natural guardian of Richard R. Riegner. She asserted, in her own right, against respondent Russell Millard and others, her own claim for medical expenses and loss of Richard's future earnings, allegedly resulting from an automobile accident involving her son and all defendants including Millard.

In the same complaint, one McSparran, as guardian of the estate of the same Richard R. Riegner, sued the same defendants for damages on Richard's behalf, also allegedly resulting from the same accident.

All defendants, including respondent Millar, are admittedly citizens of Pennsylvania, as are Richard Riegner and his mother, Martha M. Fritzinger, the petitioner in this Court.

Since the complaint itself disclosed that Mrs. Fritzinger and Millard are citizens of the same state, Millard filed a motion to dismiss Mrs. Fritzinger's complaint for lack of federal diversity jurisdiction.

Mrs. Fritzinger opposed the motion on the ground that there was "pendent jurisdiction" of her cause of action, because there was diversity between her son's guardian, McSparran, who, on the son's behalf, had also sued the defendants including respondent Millard.

The district court granted Millard's motion and dismissed Mrs. Fritzinger's complaint.

Mrs. Fritzinger (alone) filed an appeal to the Court of Appeals and the case was argued before that court on January 9, 1968. Thereafter, the case was remanded to the district court so that the parties could have the district court, under Rule 54(b), certify as final its decision on the question of "pendent jurisdiction". This was accomplished on January 23, 1968.

On February 27, 1968, the Court of Appeals directed that the case be set down for rehearing before the court *en banc*. On March 25, 1968, the clerk of the Court of Appeals sent counsel a cryptic instruction to "be prepared to argue the basic issue, namely, the question of diversity of citizenship," with no indication as to whether he referred to the obvious constitutional issue under Article III, Section 2 of the Constitution, or some other issue.

Reargument was held on April 16, 1968. The issue of "manufactured diversity" was not argued in this case. It had not been raised or decided in the district court and, for that reason, McSparran, the out-of-state guardian whose presence in the case gave rise to that issue, had not appealed to the Court of Appeals.

On the same day the manufactured diversity issue was argued in the case of *Esposito v. Emery & Spencer*, which involved the validity of diversity jurisdiction manufactured by deliberate appointment of an out-of-state guardian for a minor plaintiff. Respondent Millard filed an *amicus* brief in the *Esposito* case, directed to that issue, because, in that case, the Court of Appeals in ordering the hearing *en banc* also specifically ordered that the Clerk of the court inform counsel that "the Court desires argument and typewritten briefs upon the question whether diversity of citizenship can properly be predicated upon the citizenship of an out-of-state guardian."

On October 2, 1968, the Court of Appeals handed down opinions and orders in both cases. In the *Esposito* case, due to the voluntary disqualification of Judge Van Dusen, the Court of Appeals was divided 3 - 3 on the issue of manufactured diversity. The court therefore affirmed that judgment on the merits, and stated that, on the manufactured diversity issue, the *Esposito* case would be governed by what the court called "*McSparran v. Weist*," although (1) neither *McSparran*, the out-of-state guardian, nor *Weist* was a party to the case in the Court of Appeals, and (2) the manufactured diversity issue was not present in that case.

However, in that case, in which review by this Court is now sought, and in which the caption should be *Martha M. Fritzinger, Parent and Natural Guardian of Richard R. Riegner, a Minor, in Her Own Right v. Russell Millard*, the Court of Appeals affirmed the district court judgment which had rejected Mrs. Fritzinger's attempt to get into the district court via "pendent jurisdiction." In so doing, the Court of Appeals did not expressly rule on the validity of "pendent jurisdiction" in such a case. Instead, with Judge Biggs ineligible to participate, and with Judge Van Dusen participating, the court, by a vote of 4 - 2, affirmed the judgment dismissing Mrs. Fritzinger's pendent claim. The court stated "The pendent claim has no independent basis for jurisdiction and cannot attach to the main action which falls because the diversity of citizenship was artificially created." Although McSparran had not appealed to the Court of Appeals and was not before that court, this latter statement referred to the fact that she had been chosen guardian for the sole purpose of invoking federal jurisdiction of the minor's action against the defendants, and had no other connection with the parties or with the case.

After filing a petition for rehearing and/or further clarification, which was denied, Mrs. Fritzinger filed the petition for certiorari to which this brief responds on behalf of Millard, the only respondent.

McSparran, the out-of-state guardian, not having been a party in the Court of Appeals, is of course not before this Court.

REASONS FOR DENYING THE PETITION

1. The Court of Appeals did not decide the constitutional question involved in the doctrine of "pendent jurisdiction" over a non-federal and non-diversity cause of action, which is the only issue existing between petitioner and respondent, and the only decision certified by the District Court as a final order under Rule 54 (b).

2. The question of manufactured diversity does not involve petitioner and respondent (who are admittedly citizens of the same state), but rather respondent and a different plaintiff who was not a party in the Court of Appeals and who is not before this Court.

3. In any event, there is no reason for this Court to review this Court of Appeals' decision departing from its own prior decisions so that the district courts in the Third Circuit can now make, in individual cases, the factual determination necessary to decide whether or not any party has been improperly or collusively joined in order to invoke federal jurisdiction over a cause of action which could not otherwise be brought in the federal courts.

ARGUMENT

1. The only Appellant in the Court of Appeals, and the only petitioner in this court, is Mrs. Martha M. Fritzinger. It has always been conceded that Mrs. Fritzinger is a citizen of Pennsylvania and that respondent Millard is also a citizen of Pennsylvania.

The only issue raised by respondent Millard's motion to dismiss Mrs. Fritzinger's claim was this lack of diversity between them. As indicated in the opinion of the district judge (page 41 of the Petition), Mrs. Fritzinger's counsel based her right to join her suit with the out-of-state guardian's suit solely on the theory of "pendent jurisdiction." This fact is also evident from the opinion of the Court of Appeals (see pages 18-20 of Petition).

However, the Court of Appeals did not decide this "pendent jurisdiction" issue. That court stated (page 20 of Petition) that before reaching "the contention that the mother may maintain her pendent claim in her own right" they were required to determine first whether the "artificially created diversity" between the out-of-state guardian and the defendants actually gave the federal courts jurisdiction of that cause of action. On this issue, the court concluded (page 36 of Petition) that "the attempt to confer diversity jurisdiction in the present case offends against §1359." The court then stated that "the pendent claim has no independent basis for jurisdiction and cannot attach to the main action which falls because the diversity of citizenship was artificially created" and that "[i]t follows, therefore, that the judgment from which Mrs. Fritzinger has appealed must be affirmed."

Thus, the constitutional question of pendent jurisdiction—the only issue between petitioner and respondent—was not decided by the Court of Appeals. Mrs. Fritzinger has no right to invoke the jurisdiction of this Court to review a constitutional question which was not decided by the Court of Appeals and which, indeed, is not even

mentioned in the "Reasons For Granting The Writ" set out in her Petition for Certiorari.

This Court has consistently refused to consider and decide issues not raised by the record before it for review. See, for example, *Furness, Withy & Co. v. Yang-Tsze Ins. Ass'n.*, 242 U.S. 430 (1917); *Tyrrell v. District of Columbia*, 243 U.S. 1 (1917); *California v. Taylor*, 353 U.S. 553, 556, note 2 (1957); *Lawn v. United States*, 355 U.S. 339, 362, note 16 (1958).

Similarly, this Court has consistently declined to review constitutional issues unless actually compelled to do so by the litigation before it. *United States v. Congress of Industrial Organizations*, 335 U.S. 106, 110 (1948); *Rescue Army v. Municipal Court*, 331 U.S. 549, 568-569 (1947); *Herbring v. Lee*, 280 U.S. 110, 117 (1929); and see Mr. Justice Brandeis' classic statement in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-348 (1936).

Granting this petition would violate both these salutary principles.

2. From the facts related in the foregoing section of this brief, and in the opinions of both courts below, it is obvious that there is no diversity—either real or artificial—between petitioner Fritzinger and respondent Millard. There can be no such diversity between them. The fact that the attempt of McSparran, another, different plaintiff, to pursue respondent Millard in the federal courts via "artificial diversity", has failed, cannot possibly give Mrs. Fritzinger the right to bring Mr. Millard into this Court on that issue, especially when McSparran, the out-of-state guardian, has not even attempted to do so.

Mrs. Fritzinger was not and is not a party to the "artificial diversity" case between plaintiff McSparran and respondent Millard. Similarly, McSparran was not a party in Mrs. Fritzinger's case in the Court of Appeals and is of course not before this Court. This case is therefore governed by this Court's long standing rules against giving

advisory opinions, and against deciding anything other than actual cases or controversies between parties who are personally involved and before the court. *Tyler v. Judges of the Court of Registration*, 179 U.S. 405, 406-407 (1900); *McCabe v. Atchison, T. & S. F. R. Co.*, 235 U.S. 151, 162 (1914); *Swift & Co. v. Hocking Valley Railway Co.*, 243 U.S. 281, 289 (1917); *Herbring v. Lee*, 280 U.S. 110, 117 (1929); *American Power & Light Co. v. Securities and Exchange Commission*, 329 U.S. 90, 107 (1946); *United States v. Raines*, 362 U.S. 17, 21 (1960); and see text and citations in *Robertson & Kirkman* (Wolfson and Kurkland Edition, 1951), *Jurisdiction of the Supreme Court of the United States*, §260, pp. 463-469.

Granting this petition would violate the fundamental principles repeated over and over again in the foregoing authorities and many others covering every period of this Court's existence.

3. Even if this court were willing to ignore the jurisdictional and procedural blockades outlined hereinbefore, there is no reason why this court should even consider reaching out and reviewing the decision below.

All that has happened is that the Court of Appeals for the Third Circuit has now decided that, in view of intervening developments, it should depart from the rule it laid down in cases like *Corabi v. Auto Racing, Inc.*, 264 F. 2d 784 (3 Cir. 1959), which denied the district courts the right to learn the facts necessary to apply the prohibitions of 28 U.S.C. §1359 to particular out-of-state fiduciary cases. The decision below simply enables the district courts to make an intelligent determination as to whether or not any such party has been either collusively or improperly made or joined in order to invoke federal jurisdiction over a cause of action which could not otherwise be brought in the federal court.

Such a decision, and the procedure it sanctions, are eminently proper and, indeed, would seem to be mandated by the statute. How can a judge determine whether or not

a party has been improperly made or joined to invoke federal jurisdiction if he is denied the facts disclosing that party's relationship (if any) to the other parties and the transactions involved in the suit?

That such an inquiry is proper was indicated long ago by Mr. Justice Harlan in *Lehigh Mining & Mfg. Co. v. Kelly*, 160 U.S. 327, 336 (1895), where he noted that a transfer may be proper and be recognized for purposes of federal jurisdiction, irrespective of motive, *provided the conveyance or sale was a "real transaction"* (emphasis added). In affirming the denial of jurisdiction in that case, Mr. Justice Harlan concluded (160 U.S. 342-343) that if the Court were to rule otherwise, the statute "would become of no practical value and the dockets of the circuit courts of the United States will be crowded with suits of which the framers of the Constitution nor Congress ever intended they should take cognizance." This is an apt description of the situation which developed in the Third Circuit and provided the basis for the action of the Court of Appeals in this case.

The Court of Appeals noted that since 1954 "the rivulet of 'manufactured' diversity cases has swollen to a stream of wide dimensions" and that "the multiplication of 'manufactured' diversity cases is a reflection on the federal judicial system and brings it into disrepute." Since these are the evils which the Congress sought to prevent by 28 U.S.C. §1359 and its predecessor statutes, it is difficult to understand why this Court should be importuned to review the lower court's decision which merely permits the district courts to inquire into the facts and enforce the statute in appropriate cases.

The decision of other Courts of Appeals on which petitioner relies are clearly distinguishable. In none of them was the court faced with facts or required to make findings such as those just quoted from the opinion of the Court of Appeals in this case. If such improper and collusive joinders were rampant in those circuits—in other words, if,

instead of presenting an isolated case or two, the facts in those cases had been the same as those prevailing here—the result would have been the same. Indeed, all the post-*Corabi* cases cited by petitioner[1] as being in conflict with this case, relied on the Third Circuit's reasoning in *Corabi* on similar isolated factual situations. There is no need for this Court to assume that, if and when those other Courts of Appeals are faced with the situation now facing the Third Circuit and described in that court's opinion, they will not again follow the Third Circuit. If they do not, in some similar case, that will be time enough for this Court to consider intervening for the sake of uniformity. See *The Monrosa v. Carbon Black Inc.*, 359 U.S. 180, 184 (1959). Until that time, there is in reality no reviewable conflict and no reason for such intervention.

This Court itself has applied this and predecessor statutes with discrimination to different factual situations in both corporate and fiduciary situations. Where the "succession and transfer were actual, not feigned or colorable," this Court has found no violation of the statute. *Black & White Taxi Co. v. Black & Yellow Taxi Co.*, 276 U.S. 518, 524 (1928). But where evaluation of the factual situation indicated an improper or collusive joinder, this Court applied the statute, just as the Court of Appeals has done in this case. *Lehigh Mining & Mfg. Co. v. Kelly*, 160 U.S. 329 (1895) and *Miller & Lux v. East Side Canal & Irrigation Co.*, 211 U S. 293 (1908). And those two decisions were not disapproved in the later *Black & White Taxicab* case. Those cases also indicate that if this Court

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[1] *Lang v. Elm City Construction Co.*, 324 F. 2d 235 (2 Cir. 1963); *Stephan v. Marlin Fire Arms Co.*, 325 F. 2d 238 (2 Cir. 1963); *County of Todd, Minn. v. Loegering*, 297 F. 2d 470 (8 Cir. 1961).

The other case cited by petitioner, *Erwin v. Barrow*, 217 F. 2d 522 (10 Cir. 1954), pre-dated *Corabi* and did not involve Section 1359 but only local venue statutes.

were faced with the factual situation faced by the Court of Appeals in this case, it would reach the same result.[2]

The decision below is therefore plainly correct;[3] it does not really conflict with decisions of this Court or decisions of other Courts of Appeals; and there is no reason for any action by this Court other than to deny the petition. Indeed, the decision below, in over-ruling *Corabi*, has removed the only ostensible reason for the grant of certiorari in No. 156 of this term, *Kramer v. Caribbean Mills, Inc.*, also relied upon by petitioner. In any event, consideration of that quite different case does not require review of this case, especially in view of the jurisdictional and procedural difficulties set out herein.

Conclusion

The petition should be denied because:

(1) The "pendent jurisdiction" issue—the only issue between petitioner and respondent—was not decided by the Court of Appeals and, since it involves serious constitutional questions in a non-federal and non-diversity case, it should not be reviewed unless and until it is properly presented to this Court on a full and proper record.

(2) The "manufactured diversity" issue does not involve petitioner and respondent but rather a plaintiff who was not before the Court of Appeals and who is not before this Court.

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[2] The Court of Appeals aptly and succinctly distinguished *Mecom v. Fitzsimmons Drilling Co.*, 284 U. S. 183 (1931), as particularly inapposite here.

[3] For critical comment on the *Corabi* approach generally, see 8 Stan. L. Rev. 469 (1956); Cohan & Tate, *Manufacturing Federal Diversity Jurisdiction by the Appointment of Representatives: Its Legality and Propriety*, 1 Vill. L. Rev. 201 (1956); 3A Moore's Federal Practice ¶17.05 [3.-3].

(3) Even if this Court chose to ignore the jurisdictional and procedural blockades outlined above, it would have to find that the decision below is plainly correct on this record and that there is no reviewable conflict of any kind.

Respectfully submitted,

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